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Rep. Matt Pierce
Rep. Trent Van Haaften
Rep. Ryan Dvorak
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Rep. Cindy Noe
Sen. Richard Bray, Vice-Chairperson
Sen. Jeff Drozda
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Sen. Anita Bowser
Sen. Timothy Lanane
Sen. Frank Mrvan



INTERIM STUDY COMMITTEE ON EMINENT DOMAIN

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MEETING MINUTES¹

Meeting Date: September 21, 2005
Meeting Time: 1:00 P.M.
Meeting Place: State House, 200 W. Washington St., House Chamber
Meeting City: Indianapolis, Indiana
Meeting Number: 2

Members Present: Rep. David Wolkins, Chairperson; Rep. Trent Van Haaften; Rep. Ryan Dvorak; Rep. Ralph Foley; Rep. Cindy Noe; Sen. Richard Bray, Vice-Chairperson; Sen. Jeff Drozda; Sen. Victor Heinold; Sen. Anita Bowser; Sen. Timothy Lanane.

Members Absent: Rep. Matt Pierce; Sen. Frank Mrvan.

Rep. David Wolkins, Chairperson of the Interim Study Committee on Eminent Domain (Committee), called the meeting to order at 1:14 P.M.

The first person to testify was Kurt Webber, an attorney from Carmel, Indiana. Mr. Webber stated he was asked by the Committee to present a basic summary of eminent domain law in Indiana. Mr. Webber distributed a booklet to Committee members entitled "Indiana General Assembly Interim Study Committee on Eminent Domain Law: A Primer on the Process" (Handout #1).

¹ Exhibits and other materials referenced in these minutes can be inspected and copied in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for copies may be mailed to the Legislative Information Center, Legislative Services Agency, 200 West Washington Street, Indianapolis, IN 46204-2789. A fee of \$0.15 per page and mailing costs will be charged for copies. These minutes are also available on the Internet at the General Assembly homepage. The URL address of the General Assembly homepage is <http://www.ai.org/legislative/>. No fee is charged for viewing, downloading, or printing minutes from the Internet.

Mr. Webber said that, under appropriate circumstances, the State of Indiana or a local government or public utility in Indiana may take private property for public use without the consent of the private property owner. He said the state and federal constitutions guarantee that a private property owner must receive just compensation for this taking. He said statutes enacted by the Indiana General Assembly provide the specific procedures for these takings subject to the constitutional guarantee. Mr. Webber said the general Indiana eminent domain laws may be found in the Indiana Code at IC 32-24.

Mr. Webber continued by stating the three stages of the condemnation process consisted of the stage before a condemnation lawsuit is filed, the condemnation lawsuit stage, and the stage after the condemnation lawsuit has concluded.

Mr. Webber said that in the first stage the condemnor may enter on the property in question to examine it and conduct surveys. He said that before a condemnor files a condemnation lawsuit, the condemnor must make a good faith offer to the property owner to purchase the property. He said that while this offer had to be made in a statutorily required form, it did not have to be acceptable to the owner to be legally sufficient.

Mr. Webber continued by stating that if the owner does not accept the offer, the lawsuit stage begins when the condemnor files a complaint in court. He said that in order for an owner to raise objections to the taking, the owner had to file specific and legally sufficient objections with the court in writing and in a timely fashion. He said it was very difficult for an owner to sufficiently raise objections in the allotted time, prove them at a hearing, and get a case dismissed.

Mr. Webber said that if no objections are raised by the owner or all objections raised are overruled by the court, the court then appoints three appraisers. He said these appraisers only had to be disinterested real property owners. He stated the appraisers would determine the fair market value of the property to be taken, the fair market value of the improvements to be taken, any damage to the property "residue" that will not be taken, and the damage that will be caused by the condemnor's construction.

Mr. Webber said that a judge usually determines the amount of compensation the owner will receive. He said a jury trial could be requested by the owner, but that could considerably delay the process and cost the owner more money. As an example, he stated an owner would probably have to wait two years to get a jury trial date in Marion County. Mr. Webber said that, at the hearing, the defendant property owner had the burden to prove the owner's loss and the government plaintiff would then rebut the owner's claims. Mr. Webber said this was a unique aspect of eminent domain actions in that the positions of the two parties are "flipped" in the middle of the proceedings.

Mr. Webber continued by stating that at the conclusion of the compensation proceedings judgment is entered upon the verdict and title to the property generally vests in the condemnor when the judgment is satisfied. He added that if an owner rejects an offer and contests it in court, the owner runs the risk of having the judge or jury award the owner less than the government's original offer.

Mr. Webber concluded by stating that 99% of the eminent domain cases he had been involved in while representing either a government entity or a private property owner involved the amount of compensation the owner would receive. He said very few eminent domain cases focused on the government's right to actually take the property in question.

In response to questions from Committee members, Mr. Webber said that while the three appointed appraisers only had to be disinterested property owners, a judge usually

appoints people in the business of appraising property or real estate brokers. He said the property owner does not have any direct contact with the appraisers, but can have input concerning the instructions the judge gives the appraisers. He also said each appraiser could be called as a witness.

Mr. Webber also said that the property owner would absorb the expense of hiring an attorney and an appraiser in the lawsuit stage. He said that if there is a trial and the amount awarded an owner exceeds the last amount the owner was offered, the owner could get up to \$2,500 for litigation expenses. However, he added that he had never seen this happen and the owner's expenses would probably greatly exceed \$2,500 anyway.

Mr. Webber continued by stating he thought some of the current eminent domain laws could be improved by addressing what he felt were inconsistencies between statutes, including statutes concerning time periods for property owners to raise certain objections. He also said he thought condemning authorities should have to send an appraisal to the property owner at the time the condemnor sends the good faith offer to the owner. He said he felt the condemnor should also have to show the "work product" used to determine the amount of the appraisal.

Mr. Webber also said that unless the amount of money a property owner felt the owner should receive in compensation was more than \$40,000 or \$50,000 higher than the amount that was actually offered, the owner should just accept the offer unless he or she "just wanted to have their day in court." He reiterated that the owner would run the risk of eventually receiving even less than the amount offered by going to trial.

In response to questions from Committee members concerning the use of eminent domain for "public benefit" purposes, including creating economic development projects in "blighted" areas, Mr. Webber said one problem would always be that "blight is in the eye of the beholder." He also said it was not practical to evaluate property in a blighted area on a parcel-by-parcel basis. He stated that if the law was changed so that property owners would be compensated at a higher rate for these "public benefit" projects, the persons backing the project could just wait until the values of the properties decreased to avoid paying the increased amounts.

Mr. Webber also repeated that the vast majority of eminent domain cases did not involve whether a taking was justified as a public use or a public benefit. He said most cases were about the amount of compensation. He also said that "virtually all" eminent domain cases are settled and do not go to trial.

Rep. Wolkins then stated that representatives from the Indiana Stadium and Convention Center Building Authority (Authority) would be present at the next Committee meeting. He said these representatives would update Committee members on the Authority's ongoing negotiations with private property owners affected by the Indiana Stadium and convention center expansion projects.

The next person to testify was Shirley Yacuk from Fishers, Indiana. She stated she was against eminent domain "in any shape or form." She said "this is America" where taking property is wrong. She said government officials had to think of the people who hired them. She said Wal-Marts are not electing these officials but real people are.

The next person to testify was Mary Kay Besso from Indianapolis, Indiana. She stated eminent domain was wrong for any reason. She said she felt proper procedures had not been followed when blight determinations were made involving her neighborhood. She said it was difficult to determine where to go for help with these issues.

The next person to testify was Rick Hurst from the N.K. Hurst Company in Indianapolis. He stated his business was located at the south end of the new Indiana Stadium parking lot. He stated they had not been consulted when the new stadium and convention center expansion was being planned.

Mr. Hurst said he was not blaming anyone for his problems, but that his biggest complaint was the government's first option seemed to be using eminent domain to take his property. He said his first contact with the Authority after state government assumed oversight of the construction project in April had been a letter that contained an offer for his property that was inadequate for him to replicate his business at a new location. He said he had yet to talk to anyone face-to-face about his situation. However, he stated he had received an informal response from a representative of the Authority on September 20, 2005, that they would meet with him.

Mr. Hurst said it is projected his business will generate \$205 million in gross revenues for Indiana's economy over the next 30 years. He said he just wanted to be treated like a partner by the government and not like a competitor. He said that despite the incredible amount of time and money he and his company had spent defending themselves from their own government, he was still confident the system would work.

In response to questions from Committee members, Mr. Hurst said the proposal he will present to the Authority would allow his business to stay at its current location. He said it involved making a land swap with the Authority for other land his company owned in the area. He said his company would then make the property they keep available for use during Colts games and other events in the stadium and convention center.

Mr. Hurst continued by stating his business operated in a unique building and required special equipment. He said there was no comparable facility available anywhere in the area. He reiterated that there was no way he could replicate his business for what he was offered for the property. He said "just compensation" should include more than just the cost of the "bricks, mortar, and dirt."

Rep. Wolkins then read a statement submitted by Susan Easterday from Indianapolis. He said Ms. Easterday asked that a 12 to 18 month limit be placed on the time a piece of property could be "held under the stigma of eminent domain." He said she continued by stating that, if the government had not made a fair offer during that time period, the property owner could "proceed with their own agenda."

The next person to testify was Phyllis Nash from Indianapolis. She said "this Supreme Court judge" was abusing his authority. She said she opposed all forms of eminent domain because "it's been taken too far."

The next person to testify was Robert Beck from Carmel. He stated public works were important, but the people were not "serfs" and mayors and city and town councils were not "feudal lords." He said government officials in Indiana "must stand by the people and protect their rights" or these people will "move on to greener pastures."

Mr. Beck continued by stating eminent domain must be used for more than just increasing a tax base. He said the rights of the people must be protected from political greed and tyranny.

The next person to testify was Tom Bodkin, town attorney for Newburgh, Indiana. Mr. Bodkin stated a property owner could recover damages and attorney's fees if the government "walked away" from an eminent domain proceeding. He also said that "just

compensation" was defined by the four elements Mr. Webber mentioned, namely the fair market value of the property, the fair market value of the improvements, damage to the "residue," and construction damage. However, he said that the legislature had the power to change this definition.

Mr. Bodkin said the Indiana Association of Cities and Towns (IACT) represented virtually all cities and towns in Indiana. He said IACT was ready to work with the Committee concerning changes to Indiana's eminent domain laws that all parties could live with. He added that it was important that cities and towns and counties in Indiana retain tools for economic development.

In response to questions from Committee members, Mr. Bodkin said it was "possible but unlikely" that eminent domain could be used for political retribution. He also said that case law allowed the necessity of a taking to be attacked by a property owner.

The next person to testify was Joe Adams from Noblesville, Indiana (Handout #2). Mr. Adams read passages from the June 27, 2005, Congressional Record quoting Texas Sen. John Cornyn's statement concerning his introduction of new federal legislation entitled the Protection of Homes, Small Businesses, and Private Property Act of 2005.

Mr. Adams also said the country that used eminent domain the most was China. He said Germany and Japan do not allow eminent domain. He said that when the governments of these countries were reorganized after World War II, eminent domain powers were left out on purpose because they were "despotic and dictatorial." Mr. Adams continued by stating that if anyone thought redevelopment was impossible without eminent domain they should visit Germany.

Mr. Adams also said the governor of Connecticut had ordered the New London Development Corporation to rescind eviction notices that had been sent to New London homeowners involved in the Kelo decision.

Rep. Wolkins then distributed excerpts from Widener University law professor Benjamin Barros' testimony made before the Pennsylvania House of Representatives State Government Committee on August 31, 2005 (Handout #3). Rep. Wolkins stated Professor Barros said that in responding to Kelo the state could (1) prohibit the taking of homes for economic development, but allow economic development taking of other types of property, (2) allow the taking of a home for any public use only after a finding that was reviewable by a court that there was no alternative course of action, or (3) require governments to pay a premium over fair market value for a taken home.

Rep. Wolkins also distributed a copy of an e-mail he had received from John Ryskamp of Berkeley, California (Handout #4). Rep. Wolkins said Mr. Ryskamp indicated California law allows private property to be taken for a stated public use only when just compensation ascertained by a jury has been paid to the owner. He said Mr. Ryskamp states California law does not allow private property to be taken for private use.

Rep. Wolkins then asked the Committee members to send him all their recommendations concerning changes to Indiana eminent domain law before the next meeting.

After a brief discussion by Committee members, Rep. Wolkins said that he sensed there was Committee interest in dealing with the definition of "blight," further defining what "just compensation" should be, requiring negotiations or mediation during the eminent domain process, increasing the availability and amount of attorney's fees paid to property owners, and requiring property to revert to the private property owner after a specified time period.

He said he also sensed the Committee did not want to completely do away with the use of eminent domain for economic development purposes.

Rep. Wolkins then stated the next meeting would probably take place during the last week of October. He said that, at the meeting, the Committee would vote on the concepts that would be included in legislation.

Rep. Wolkins then asked that material sent to him by James McCullum from Noblesville, Indiana, Dan and Joanna Danzl from Floyds Knobs, Indiana, and Lake Tire & Marine in Hammond, Indiana be included in the minutes (Handout #5).

Rep. Wolkins adjourned the meeting at 3:37 P.M.